No. 7820

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH RIVER INSURANCE COMPANY (a corporation),
Appellant and Cross-Appellee,

vs.

GUY H. CLARK, as Receiver of the Montborne Lumber Company (a corporation),
Appellee and Cross-Appellant.

BRIEF FOR APPELLANT AND CROSS-APPELLEE.

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This appeal is taken from a judgment of the District Court of the United States for the Western District of Washington, Northern Division, awarding to appellee and cross-appellant the sum of seven thousand dollars ($7000.00) as and for a total loss by fire of a certain logging locomotive owned by appellee and cross-appellant and insured against loss or damage by fire and certain other perils by appellant and cross-appellee.

For simplicity, we shall hereafter refer to appellant and cross-appellee as defendant, and appellee and

cross-appellant as plaintiff, which are the positions they respectively occupied in the Court below.

The plaintiff is the receiver of the Montborne Lumber Company, which owned the locomotive, and the defendant is an insurance company. The plaintiff commenced an action on the policy against defendant in the Superior Court of the State of Washington, in and for the County of Skagit, from which defendant removed the case to the District Court of the United States for the Western District of Washington, Northern Division. Thereafter, issue was joined and the case was tried to the Court without a jury, upon a stipulation of facts. The attorneys for the respective parties then made motions for a declaration of law and for special findings in accordance with the said stipulation, and for judgment in favor of their respective clients (Tr. 57). Findings of fact by the Court were made in the precise language of the stipulations of facts (Tr. 65). Judgment was given for the plaintiff in the sum of seven thousand dollars ($7000.00), from which judgment this appeal is prosecuted.

STATEMENT OF FACTS.

On August 11, 1930, Montborne Lumber Company was engaged in the business of logging near Montborne, Skagit County, Washington, and in connection with said operations the lumber company built a logging railroad partly over trestles, back into the timber to the scene of the logging operations from the station of Montborne on the Seattle-Sumas main line of the Northern Pacific Railway Company (Tr.

33, Par. 3). The lumber company owned a certain ninety (90) ton Shay locomotive, shop number 2703 (Tr. 34, Par. 5). The cars used in the logging operations were not owned by the lumber company but were furnished by the Northern Pacific Railway Company and were hauled to and from Montborne station by the logging engine. These cars were delivered by the railway company under an agreement commonly used in such operations, by the terms of which the lumber company became, to all intents and purposes, an insurer of the rolling stock belonging to the railway company (Tr. 34-35, Pars. 6, 7 and 8; Tr. 40, Par. 2).

On August 11, 1930, the defendant insurance company issued to the Montborne Lumber Company its policy of insurance which insured the logging locomotive against various perils, including that of fire (Tr. 50, Par. 2), which by endorsement of the same date (Tr. 56), insured the legal liability of the logging company with respect to the rolling stock belonging to the Northern Pacific Railway Company.

About September 4, 1930, a forest fire broke out in the holdings of the lumber company and spread on to and over portions of the logging railroad, destroying the bridges and trestles of the railroad (Tr. 34, Par. 4). The fire also damaged a number of cars belonging to the Northern Pacific Railway Company (Tr. 36, Par. 11). The logging locomotive, however, was then situated on the logging railway in the woods, and by reason of the destruction of the bridges and trestles on the logging railroad between the locomotive and Montborne station, the locomotive was marooned. The locomotive itself was never in contact

with the fire and sustained no physical damage as a result of the fire (Tr. 34, Par. 5). The cost of sufficiently repairing the bridges and trestles in order to get the locomotive out of the woods down to Montborne station would exceed the value of the locomotive, which is agreed to be seven thousand dollars ($7000.00), (Tr. 34, Par. 5).

The defendant insurance company, which had insured the legal liability of the lumber company with respect to the Northern Pacific Railway Company cars, paid eight thousand dollars ($8000.00), the value of the damaged cars directly to the Northern Pacific Railway Company (Tr. 38, Par. 17), under an agreement wherein the railway company undertook to save the insurance company harmless from any claim at the hands of anyone with respect to these cars. The insurance company refused to pay anything for the locomotive (Tr. 38, Par. 18).

Suit was brought upon the policy by the receiver of the Montborne Lumber Company for the purpose of recovering seven thousand dollars ($7000.00), the agreed value of the locomotive, and also the amount of money which the insurance company had previously paid to the Northern Pacific Railway Company (Tr. 39, Par. 19).

Judgment was rendered for the plaintiff for the agreed value of the locomotive, seven thousand dollars ($7000.00), and the claim for the lost and damaged railway cars was disallowed (Tr. 31).

This appeal is from the judgment awarding the plaintiff seven thousand dollars ($7000.00) for the

locomotive and the cross-appeal is from that portion of the judgment denying the plaintiff the value of the lost and damaged railway cars. This brief will concern itself only with the judgment for the value of the locomotive. The Northern Pacific Railway Company, although not a party to the litigation in form, is in reality defending through its own counsel the claim for the lost and damaged railway cars and will write the brief in the cross-appeal.

ASSIGNMENT OF ERRORS.

The assignment of errors is as follows:

First: The Court erred in denying defendant's motion made October 3, 1934, for findings and declaration of law in its favor.

Second: The Court erred in denying defendant's motion made January 14, 1935, for the entry, upon the findings, of a conclusion of law that defendant is entitled to judgment of dismissal, together with costs and disbursements as provided by law, and for entry of judgment for defendant pursuant to such conclusion, to which denial defendant duly excepted and its exception was allowed.

Third: The Court erred in entering judgment herein for the plaintiff in the sum of seven thousand dollars ($7000.00), for the reason that the judgment is not supported by the findings, and particularly that portion of Finding No. IV which declares that the locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire, to

the entry of which judgment defendant duly excepted and its exception was allowed.

Fourth: The Court erred in construing the insurance policy in this case as covering a loss of the insured locomotive when the said locomotive had suffered no physical damage whatever as a result of the fire or as a result of any other peril insured against.

Fifth: The Court erred in holding that said locomotive was a total loss by fire within the meaning of said insurance policy.

Sixth: The Court erred in holding that the fire was the proximate cause of the loss of the locomotive.

Seventh: The Court erred in holding that the said locomotive was a total loss by fire.

Eighth: The Court erred in holding that the locomotive had sustained any loss or damage whatsoever as a result of fire.

Ninth: The Court erred in construing the insurance policy to cover loss of use of the locomotive.

Tenth: The Court erred in holding the defendant liable upon a contract of insurance for which there was no consideration (Tr. 102-103).

These assignments may be grouped and will be discussed under the following affirmative propositions:

1. Inasmuch as the stipulation of facts and the finding made thereon is that the locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire, it was error to hold that the locomotive had sus-

tained any loss or damage whatever as a result of fire within the meaning of the insurance policy.

2. The judgment in effect permits plaintiff to recover for a loss of use of the locomotive under an insurance policy which did not insure such loss of use and for which the plaintiff paid no consideration.

3. Fire was not the proximate cause of the loss, if any, of the locomotive.

ARGUMENT.

I.

INASMUCH AS THE STIPULATION OF FACTS AND THE FINDING MADE THEREON IS THAT THE LOCOMOTIVE ITSELF WAS NEVER IN CONTACT WITH THE FIRE AND SUSTAINED NO PHYSICAL DAMAGE AS A RESULT OF THE FIRE, IT WAS ERROR TO HOLD THAT THE LOCOMOTIVE HAD SUSTAINED ANY LOSS OR DAMAGE WHATSOEVER AS A RESULT OF FIRE WITHIN THE MEANING OF THE INSURANCE POLICY.

It was expressly stipulated that

> *"The locomotive itself was never in contact with the fire and sustained no physical damage as a result of the fire"* (Tr. 34, Par. 5).

and the finding made by the court was in exact accord with the stipulated fact (Tr. 75; Finding No. IV). Nevertheless, the Court gave judgment for the full agreed value of the locomotive as and for a total loss by fire.

This, we claim, was manifest error. The error is intended to be raised by the first, second, third, fourth,

fifth, seventh and eighth assignments of error (Tr. 102-103).

This action is founded upon a policy of insurance which insured not only against fire but derailment, collision, as defined in the policy, collapse of bridges, lightning, cyclone, tornado and flood (Tr. 50, Par. 2). The only peril relied upon by the plaintiff was fire, and yet recovery was permitted in spite of the fact that the locomotive suffered no physical damage whatsoever and was, after the fire, just as perfect in form and function as it was before. This is an astounding result and one that the parties to the contract of insurance never contemplated at the time it was written.

It can be seen from a mere reading of the policy that the subject matter of the insurance is a locomotive and that what the parties contemplated when the contract of insurance was written was a loss of or damage to the locomotive in the sense that it should either be totally destroyed by fire so that it bore no resemblance to the operative machine described as a locomotive, or else that it should be so physically damaged that it required physical repair.

The perils clause itself shows an intention to insure against risks which, if operative, might reduce the locomotive to a disorganized collection of mechanical parts or damage it so that it could not operate as a locomotive. Among the perils are not only fire but derailment or collision, in which events it must be obvious that there would be physical loss or damage to the locomotive. The other perils are collapse of

bridges, lightning, cyclone, tornado and flood, all of which, if operative, would result in physical loss or damage to the locomotive.

This understanding of the parties is reinforced by the language of two clauses in the policy, both of which contemplate physical loss or damage to the locomotive. The second paragraph under clause 2, Perils Insured Against, reads as follows (Tr. 51):

> "It is understood and agreed that in the event of *loss or damage to any part or parts* of the within insured property resulting from any one accident from perils insured against, this company shall only be liable for loss or damage in excess of two hundred fifty dollars ($250.00)."

Again in paragraph 3-c of the policy (Tr. 51), we find the following significant language:

> "It is mutually understood and agreed that this company shall not be liable beyond the actual cash value of the interest of the assured in the property at the time of loss or damage nor *exceeding what it then cost the assured to repair or replace the same with material of like kind and quality.*"

It thus clearly appears from the language of the policy itself that the liability contemplated is for the physical damage to the locomotive from a peril insured against.

The Court below justified its judgment upon the theory "that the value of the locomotive itself has been as effectually destroyed by the destruction of the bridges and consequent marooning of the locomotive as if the fire had reduced to a molten mass the com-

ponent materials of the locomotive" (Opin. of the Court, Tr. 61, last par.).

The destruction of the trestles and the finding that their reconstruction would exceed the value of the locomotive (Finding No. IV; Tr. 75), are false quantities in the case. This conclusion can be tested in very simple fashion. Suppose there was only one bridge between the terminus of the railway in the woods and its junction with the main line of the Northern Pacific; that the bridge collapsed from the weight of a car on it at a time when the locomotive was at the terminus of the logging road in the woods, and that the cost of repairing the bridge was, say, $500.00. Assume further that the bridge would have to be repaired in order to conduct the operations of the logging company. Could anyone say that the cost of repairs to the bridge would be a claim under a policy insuring the locomotive which, according to hypothesis, has received no physical damage of any kind?

Or suppose that a flood (a peril insured against, policy clause 2, Tr. 67) washed out fifty feet of track while the locomotive was at the terminus in the woods. Could it be said that the cost of repairing the track was a claim under this policy which insures the locomotive and not the track? The mere statement of the question carries with it its own answer, which of course obviously is a negative one. It follows, therefore, that the cost of repairing the track or the expense of rebuilding bridges, whether more or less than the value of the locomotive, cannot possibly be a factor in the case, and that the finding of the Court

to the effect that the cost of sufficiently repairing the said bridges and trestles in order to get the locomotive out of the woods and down to Montborne station would exceed the value of the locomotive can furnish no possible support for the judgment.

In this connection we call the attention of the Court to a very recent case, *Weinberger Banana Co. vs. Phoenix Assurance Co.*, 74 Fed. (2d) 539, (5 C.C.A.). In this case it was held that the insured could not recover for loss of bananas due to delay of a train transporting bananas because of washed out bridges, under a policy insuring against loss of bananas by reason of accident to conveyance during transportation. The following language from the opinion of the Court is peculiarly applicable to the situation presented by the case at bar. We quote as follows:

> "If the parties to the contract had intended the insurance of the bananas to cover, in addition to the risk of derailment, collision and other named risks, also risks of accident not only to the car or cars on which the bananas were loaded *but to railroad tracks or bridges and railroad equipment other than cars, it may fairly be inferred that appellant would not have tendered, and appellee would not have accepted, a policy containing a typewritten rider specifying the risks insured against in which no accident affecting the safety of the bananas was mentioned except by the use of the words 'any accident to the conveyance'.* If risks of accidents other than such as might happen to the car or cars upon which the bananas were loaded had been intended to be insured against, it reasonably may be supposed that the

> typewritten rider, which enumerated the risks insured against while the bananas were on hand, would have contained instead of the words 'any accident to the conveyance' some such language as 'any accident to the track, bridges, cars, or other railroad equipment causing loss or damage to the bananas', or 'any accident resulting in loss or damage to the bananas while loaded on railroad cars' " (pp. 541-542; italics ours).

Suppose again the locomotive could be used only for hauling lumber and that on account of its peculiar construction it could be used only for hauling logs in the district where the fire occurred, or suppose that the fire destroyed all the timber that could be logged, and further, that at the time of the fire the locomotive was safe at Montborne station. According to plaintiff's theory there would be a loss under the policy because the locomotive had lost its employment.

Or suppose that a portion of the track between the woods and Montborne station was owned by the Northern Pacific instead of the lumber company, and that this track was destroyed by fire so that the locomotive was just as much marooned in the woods as it is now, and suppose, further, that for some reason or other the Northern Pacific did not care to rebuild the track or did not do so for a year. Under the plaintiff's theory, if the track were never rebuilt by the Northern Pacific there would be a total loss of the locomotive, and if it were rebuilt within a year there would be a partial loss, in which case we would be pleased to know how the plaintiff would calculate its loss.

All of these supposititious cases demonstrate very clearly that at the time this policy was written, the parties contemplated nothing but physical loss of or damage to the locomotive. After all, an insurance contract must, like any other contract, be interpreted in the light of the intention of the parties.

As was said in the case of *King vs. New York Life Insurance Co.,* 72 Fed. (2d) 620 at 623:

> "Courts should not be cunning and astute to evade rather than quick to perceive and diligent to apply, the meaning of the words, as manifestly intended by the parties."

In the Court below, the plaintiff took the position that ignition or burning of the subject matter of the insurance was not necessary to justify a recovery for loss or damage under a fire policy. This is, of course, undoubtedly true and the books abound with examples of cases where, under a fire policy, the plaintiff was permitted to recover even though there was no ignition or burning. A familiar example for which no authority need be cited is the case of destruction of goods by water used to extinguish a fire, but in these cases and all of the cases relied upon by plaintiff there was *the element of physical destruction or damage.*

Take the cases of *Russell vs. German Fire Insurance Co.* (Minn.), 10 L. R. A. (N. S.) 326; 111 N. W. 400, and *Western Assurance Co. vs. Hann* (1917), 201 Ala. 376; 78 So. 232. These are known as fallen wall or building cases, and in both of them there was serious physical loss and damage. Furthermore, in each there was a question of fact as to whether the antece-

dent fire which damaged and weakened the wall, or the subsequent wind which blew it over, was the proximate cause. This question is obviously one of fact for a jury, and all these cases hold is that the jury's finding under the circumstances will not be upset.

Again, in *Brandyce vs. U. S. Lloyd's, Inc.* (N. Y. 1924), 147 N. E. 201, there was the element of physical loss and damage in that the potatoes physically deteriorated and were sold in damaged condition for about sixty per cent of their sound value. In this case the peril insured against was sea peril, which obliged the vessel with the potatoes on board to seek a port of refuge and the deterioration took place during delay in the port of refuge. The significant point is that there was physical damage and deterioration of the potatoes.

In *Hall vs. Great American Ins. Co.* (Iowa, 1934), 252 N. E. 763, there was this ever present element of physical loss and damage in that the ring involved in that case could not be found after the fire. But observe again, as in the fallen wall cases, the question of what happened to the ring, or in other words, the proximate cause of its loss, was a question of fact which was properly left to the jury. The holding of the case is in reality that the finding of the jury that the ring was lost by fire, or as a result of fire, will not be disturbed. Once more, however, be it observed that there was a physical loss of the ring. The locomotive has not been lost but is in the woods in as good condition as it was before the fire.

In *Lynn Gas & Electric Co. vs. Meriden Fire Ins. Co.,* 158 Mass. 570; 33 N. E. 690; 20 L. R. A. 297, there was again this indispensable element of physical damage. All the case holds is that notwithstanding the intricate chain of causation, this physical loss and damage was proximately caused by the fire.

In *Stag Mining Co. vs. Missouri Fidelity Co.* (Mo. 1919), 209 S. W. 321, there was not only physical loss but the liability was admitted by the insurer. The only question in the case was the measure of indemnity and whether it should be what the land sold for under execution, or what it was really worth.

This also was substantially the question in *Brady vs. Northwestern Assurance Co.,* 11 Mich. 425. There was no question of proximate cause in this case but only of the measure of indemnity, whether it should be the full value of a building partially destroyed by fire which, under a local ordinance could not be repaired, or merely the value of the materials destroyed.

In any event, the *Brady* case is entirely distinguishable. In the first place, it presents the element which is ever present in plaintiff's authorities and totally lacking in the case at bar, namely, that of physical loss and damage. In the second place, it goes upon the ground that the existence of the ordinance was, or should have been, known to the underwriters and therefore the precise situation which arose in the *Brady* case must have been within the contemplation of the parties. As we have already shown, it was never in the contemplation of the parties, nor the intention of either, as derived from the language of the

insurance policy, that the underwriter should be liable in the event of a forest fire which did no physical damage to the locomotive.

In *Hale vs. Washington Ins. Co.,* 11 Fed. Cas. No. 5916, there was also a physical loss, namely, the amount of money which the owner of the insured vessel was obliged to pay to the British vessel as a result of the collision, which was a risk insured against in the policy on the American vessel. There can be no question of the correctness of this decision. This expenditure which the assured was allowed to recover under his policy was a compulsory one. There is, however, no element of compulsion in the case at bar. The plaintiff is not obliged to rebuild the tracks and trestles, and in no true sense can the locomotive be said to be chargeable with the expense of such reconstruction.

The foregoing were the authorities relied upon by plaintiff in the Court below. None, however, are in point in the determination of the question at bar because in every one of these cases there was a recovery for physical loss and damage.

The circumstance that notwithstanding diligent search, plaintiff's counsel has been unable to find a single case in which recovery against an underwriter on this type of policy has been allowed where there was no element of physical loss or damage, should be persuasive in reaching the conclusion that policies of this type insure nothing but physical loss or damage arising from perils insured against.

On the other hand, we are able to present to the Court a case in which a specific object was insured

against designated perils and in which there was a financial loss, but because there was no physical damage to the insured object, recovery was denied. The case is *Edgar Thompson Steel Co. vs. Boylston Mutual Ins. Co.,* 12 Mo. App. 244. In this case the plaintiff insured pig iron on a policy of marine insurance against several perils, including sea peril. The subject matter of the insurance was pig iron in transit. The iron was loaded on a barge and the barge sank in the Mississippi. The underwriter recovered the pig iron from the river and sent it to destination, where it arrived undamaged. The plaintiff brought suit on the policy upon the ground that had there been no accident, the iron would have reached the port of Pittsburgh on the eighth day of March, 1880, at which time it was worth $43.00 per ton, but was worth a considerably lesser sum when it actually did arrive. Judgment went against the plaintiff. In the course of the opinion the Court said:

> "It is evident on a reading of the petition that the plaintiff does not claim insurance for loss of its property * * *.
>
> So, * * * it is safe to say that insurance against injury, detriment or damage to goods caused by the perils of navigation will secure no indemnity against losses from delay caused by the same perils not involving any injury, detriment or damage to the goods * * *. A loss in value consequent upon the falling market, combined with delay in tranportation, is due in part, at least, to something else beside the causes specified in the guarantee. It results also from the fluctuations of commerce, which have nothing to do with the perils of navigation.

> * * * The entire guarantee, in short, is that the goods shall arrive whole and uninjured at Bessemer. * * * We cannot see from the showing in the petition that the insurers were in any default upon the terms of their engagement."

It will be noted that in this case, as in the case at bar, the plaintiff suffered a loss but there was no physical damage to the goods. It could well be argued that there was a loss by sea peril. The iron, however, arrived in undamaged condition, just as the locomotive in the woods is in undamaged condition. The Court says that the engagement of the underwriters was that it should arrive in undamaged condition, and in the case at bar the engagement of the underwriters is that the locomotive shall not be physically lost or damaged by fire.

In the Court below, plaintiff's counsel pointed out that the underwriters in the pig iron case fished the pig iron out of the water and sent it on to destination and that under the authority of this case the underwriter in the case at bar should rebuild the tracks and trestles and get the locomotive out, if it did not wish to pay the value of the locomotive. It was said that figuratively speaking the locomotive was at the bottom of the river just as much as the pig iron was.

This reasoning is entirely fallacious and overlooks completely the distinction between the policy in the case of the pig iron and the policy in the case at bar. The obligation of underwriters on a policy insuring goods in transit from A to B is that the goods shall arrive at B undamaged by reason of the operation of

any peril insured against. In the case at bar there is no such transit obligation. *There is no guarantee or insurance that the locomotive shall run during the life of the policy upon the tracks between the woods and Montborne station, or that it shall run at all.* The only insurance is that during the life of the policy the locomotive shall not be physically lost or damaged by reason of fire.

II.

THE JUDGMENT IN EFFECT PERMITS PLAINTIFF TO RECOVER FOR A LOSS OF USE OF THE LOCOMOTIVE UNDER AN INSURANCE POLICY WHICH DID NOT INSURE SUCH LOSS OF USE AND FOR WHICH THE PLAINTIFF PAID NO CONSIDERATION.

This point is raised by the ninth and tenth assignment of errors (Tr. 103).

What the plaintiff has lost is an opportunity to make profitable use of the locomotive unless, of course, it is willing to go to the expense of rebuilding the track and trestles. The locomotive itself is undamaged and not one single one of its functions has been impaired. It is a going concern but limited in its operation solely because of the lack of track and trestles. The track and trestles were not insured under this policy. Neither was the mechanical and useful operation of the locomotive insured. What the plaintiff, therefore, is in reality seeking is to read into a fire policy which specifically insures the locomotive, an insurance of some gain, actual or prospective, to arise from dealing with the locomotive.

This is a subject matter of insurance which can, of course, be covered by a proper policy. It is very closely analogous to a policy of use and occupancy or to one on profits. An insurance of this character, however, cannot be read into a policy which insures specific objects against designated perils.

In *Leonarda vs. Phoenix Ins. Co. of London,* 15 La. Rep. (part 2) 71; 2 Rob. 131, the plaintiff sued upon a fire policy claiming a loss of rent while repairs to the building were being made. In giving judgment for the underwriters the Court said:

> "There is much analogy between the rent of a house and the freight of a ship; both are the civil fruits of the thing from which they are derived. It is believed that the attempt has never been made to recover freight under a policy of insurance on a vessel; and yet the loss of the freight, like that of the rent, is a direct consequence of the destruction of the vessel. In both cases the loss falls on a thing which is no part of the object insured and which is not, therefore, covered by the policy."

Suppose an oil burning steamer was in an out of the way port to fuel and that as a result of conflagration the fuel supply of the entire port was destroyed so that the steamer, for lack of fuel, was unable to arrive at a distant loading port in time to enable her to fulfill a valuable charter, with the result that a substantial profit was lost. Fire undoubtedly is the agency that deprives the steamer of her profit and causes a loss. If the hull policy covered the risk of fire, could anyone say that under these circumstances the under-

writers who insured the steamer and not the charter would be liable for this loss?

A case arose in England in which the assured had taken the policy upon his interest only in the Ship Inn. An arbitrator awarded him a sum for loss sustained his business as an innkeeper, the inn having been partially destroyed by fire, but Lord Denman, C. J., said:

> "It is clear to us that the arbitrator had no authority to award compensation to Wright for the loss he had sustained in his business by not being able to occupy the premises. The policy was not intended to cover profits of the business.
>
> Littledale, J. I am of the same opinion.
>
> Taunton, J. I think that profits are insurable but they must be insured as profits. A party is not entitled to compensation for loss of profits under an insurance of his interest in the Ship Inn."
>
> (*In re Sun Fire Office,* 3 N. & M. 819, Court of King's Bench, 1835).

In *Stock vs. Engels,* L. R. 9 Q. B. D. (1881-2) 708, plaintiff had effected a policy of marine insurance on goods and made a contract to buy sugar from a merchant. The merchant put a quantity of sugar on a vessel but no selection in a technical sense was ever made of any particular sugar. A loss having occurred, it was held that the plaintiff had no insurable interest in the sugar but that he did have an insurable interest in the profits. It was held, however, that the profits had not been insured, the object of the insurance being the goods. The Court said:

> "Whether the profit was lost by any of the perils insured against, it is unnecessary for me to consider, for it is now well settled that such a loss cannot be recovered under a policy framed like the present, merely on goods."

Perhaps the strongest language as to the necessity of insuring profits specifically is to be found in *Lusena vs. Craufurd,* 127 Eng. Rep. 630 at 648, where the reporter says:

> "The learned judges were unanimously of the opinion that the policy in question could not be considered as a policy on profits, having been expressly declared a policy upon the plaintiff's interest in the ship and goods themselves; and that if it had been intended as a policy on profits, it should have been so stated."

An American expression of this same opinion is to be found in *Connecticut Fire Ins. Co. vs. W. H. Roberts Lumber Co.,* 119 Va. 479; 89 S. E. 945, where the Court said:

> "The character of contracts of insurance of property or an interest or interests in the property itself is very different from a contract of insurance of profits to arise from dealing with such property * * * and the text writers and decisions of the courts seem to be uniform in their expression of the rule that a policy of insurance will not be held to cover profits unless the purpose to do so is expressly stated in the policy."

At first blush it might appear that the profits cases cited above throw little light on the subject of this inquiry, but when the precise nature of the plaintiff's

loss is considered, it becomes apparent that the profits cases in reality furnish the clue for which we are looking.

These cases on profits show, to our mind, conclusively that the plaintiff is endeavoring to read into the policy a form of insurance which is not in the policy under the settled canons of insurance law and was certainly never contemplated by the parties at the time the contract was made. Moreover, the plaintiff paid no premium for this extraordinary form of protection which he has now capitalized in the shape of a judgment.

III.

FIRE WAS NOT THE PROXIMATE CAUSE OF THE LOSS, IF ANY, OF THE LOCOMOTIVE.

This point is raised by the sixth assignment of errors (Tr. 103).

In the Court below the plaintiff relied upon general expressions of the rule of proximate cause found in the text writers and similar definitions appearing in the authorities which we have heretofore analyzed under point I of this brief. These definitions, however, are all derived from actual decided cases in which there was physical loss or damage to the specific subject matter of the insurance, and the plaintiff has not been able to present a single case in which recovery was allowed, notwithstanding the fact that the subject matter of the insurance was as perfect in form and function as it was before the fire.

Nothing is better settled than the principle that general expressions and definitions in broad terms must be confined to the circumstances to which they have reference or have been applied. In *Bird vs. St. Paul Fire & Marine Ins. Co.,* 224 N. Y. 47; 13 A. L. R. 875; 120 N. E. 86, the Court, speaking by Cardozo, J., (now Associate Justice of the Supreme Court of the United States), said:

> "General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."

Again, in *Leyland Shipping Co. vs. Norwich Union Fire Ins. Society,* 1918 A. C. 350, 369, Lord Shaw, of the House of Lords, used the following language:

> "The true and the overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident, and this, not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all."

After all, an insurance contract must, like any other contract, be interpreted in the light of the intention of the parties. The several supposititious cases put under the first point of this argument, clearly demonstrate that the parties to this insurance contract never contemplated anything but physical loss and damage to the locomotive. To allow the plaintiff to recover in this action is to put a premium upon the cunning and astute evasion condemned in *King vs. New York*

Ins. Co. supra; it is to deal with causation in the "artificial sense" that Lord Shaw had in mind in the *Leyland Shipping* case, and not in the "real sense which parties to a contract must have had in their minds when they spoke of cause at all."

As a matter of fact, the fire is not the proximate cause of the loss of which the plaintiff complains, namely, his inability to use the engine. The finding that the cost of sufficiently repairing the bridges and trestles in order to get the locomotive out of the woods and down to Montborne station would exceed the value of the locomotive (Tr. 75, Finding No. IV), and the finding that shortly after the fire the lumber company became hopelessly insolvent and went into receivership and is now being liquidated (Tr. 81, Finding No. XIII), show very clearly two things: First, that the plaintiff has no further productive use for the locomotive, as the logging operations are to be abandoned, and second, that it will cost more to get the locomotive out than it is worth.

Now, suppose the plaintiff was entirely solvent and still had an abundant supply of timber from the logging of which it could derive profits far in excess of the relatively small cost of rebuilding the railroad and trestles. Obviously it would rebuild and that, too, without regard to the comparatively small value of the locomotive as compared with the cost of rebuilding. Under such circumstances, would anyone say that the whole, or any part, of the cost of rebuilding the railroad should be collected from the underwriters who insured the locomotive against the risk of physical loss or damage by fire?

This illustration shows, we think, that there has been no loss whatever of the locomotive. If the railroad were rebuilt, the locomotive would be just as valuable as ever and there would be no loss whatever. How, then, can the fact that it is not economically desirable, owing to plaintiff's insolvency and liquidation, to rebuild the railroad and trestles, convert an absolutely sound physical engine into a total loss, or any loss at all?

The underwriter in this case never insured the railroad or the trestles or agreed directly or indirectly that they should continue in existence during the life of the policy. The Court below, however, has held in effect that if it is not economically desirable to rebuild the railroad, the owner of the railroad has sustained a total loss of its locomotive even though that locomotive is physically as good as it was before the fire.

We submit that any interpretation of proximate cause which produces such a result is artificial and cunning in the extreme.

CONCLUSION.

This is a case of first impression. The industry and research of counsel for both parties has not succeeded in producing any controlling authority. The principle which should govern the decision in this case has to be spelled out from cases which are at best analogous. The facts in this case are novel, but this novelty should not obscure the principles involved. It is one of the virtues of the common law that it has the

capacity to meet new situations as they arise and deal with them in the light of established principles.

We take it that the principles involved in a decision of this case are, first, that any contract, insurance or otherwise, should be construed in the light of the intention of the parties and the situation which they contemplated at the time the contract was made; second, that the question of proximate cause should be dealt with in a realistic and not an artificial sense; and third, that while the benefits to be derived from the use of property may be insured, they are not insured under a policy on the property itself.

We have shown that no one at the time this contract of insurance was made contemplated protection against anything except physical loss and damage to the locomotive and that certainly the parties never had in mind a case where a raging forest fire would spread destruction over a large area and leave the locomotive untouched. We have also shown that in no realistic sense has there been any loss of or damage to the locomotive in any degree whatsoever as a result of fire but solely because, for one reason or another, the railroad has not been rebuilt, and we have shown that the plaintiff is endeavoring to utilize this policy as a means for recouping a loss of something entirely different than the locomotive itself, and to that end has attempted to read into the policy a protection which is not there and for which no premium was paid.

Under these circumstances, we submit that the judgment is not supported by the findings; that it should

be reversed and the lower Court directed to enter judgment in favor of the appellant and cross-appellee, the defendant below.

Dated, San Francisco, California,
July 22, 1935.

Respectfully submitted,

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